FILED
JUL 28 1943
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1943

No. 205

320 US #8
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THE CITIZENS AND SOUTHERN NATIONAL BANK, Co-Trustee of the estate of Emanuel Ullman deceased,

Petitioner

versus

COMMISSIONER OF INTERNAL REVENUE,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

McKIBBEN LANE,
CHAS. J. BLOCH,
WILLIAM C. TURPIN, JR.,
Counsel for Petitioners.

HALL & BLOCH,
TURPIN & LANE,
Of Counsel.

LYON, HARRIS & BROOKS, MACON, GA.

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SUPREME COURT OF THE UNITED STATES
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No.....

THE CITIZENS AND SOUTHERN NATIONAL BANK, Co-Trustee of the estate of Emanuel Ulman, deceased,

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versus

COMMISSIONER OF INTERNAL REVENUE,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable, the Supreme Court of the United States:

May it please the Court:

The petitioner, The Citizens and Southern National Bank, as co-trustee of the estate of Emanuel Ulman, deceased, by its attorneys, McKibben Lane, William C. Turpin, Jr., and Charles J. Bloch, respectfully shows to this Honorable Court:

A

SUMMARY STATEMENT OF THE MATTER INVOLVED

The controlling question in this case is:

A testamentary trustee, upon the death of the

testate, receives as such trustee common stocks which are not legal investments for trustees under the laws of the State. Under the law of the State, it can only hold these stocks at its own risk. The trustee is not able to find a purchaser for such common stocks by reason of the excessive price thereof. May the trustee exchange the stock with the corporation which issued it for stock in another corporation for which there is a market (such exchange being for the sole purpose of immediately selling such latter stock) without liability for taxation as for a dividend in liquidation of the corporation with which it made the exchange.

Does not the substance of a transaction rather than the form determine income tax liability?

B

REASONS RELIED ON FOR THE ISSUANCE OF THE WRIT

The pertinent portion of Section 117 (a) of the Revenue Act of 1936 is:

> "SEC. 117. CAPITAL GAINS AND LOSSES.
>
> (a) General Rule—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income:
>
> * * * * * * *
>
> 40 per centum if the capital asset as been held for more than 5 years but not more than 10 years;"

The pertinent portion of Section 115 of the Revenue Act of 1936 is:

"SEC. 115. DISTRIBUTION BY CORPORATIONS.

* * * * * * *

(c) Distributions in Liquidation. — Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. Despite the provisions of section 117(a), 100 per centum of the gain so recognized shall be taken into account in computing net income. * * *

* * * * * * *

"(i) Definition of Partial Liquidation. — As used in this section the term 'amounts distributed in partial liquidation' means a distribution by a corporation in complete cancellation or redemption of a part of its stock, or one of a series of distributions in complete cancellation or redemption of all or a portion of its stock."

The Citizens and Southern National Bank was under the Will of the Decedent, Emanuel Ulman (date of death: July 11, 1929), appointed co-executor and co-trustee. The Will required the payment of debts and certain specific bequests, and the residuary net estate was to be held in trust for the benefit of specific beneficiaries, the income to be paid to certain life tenants, and upon the death of the life tenants, the Corpus of the Estate was to be distributed to a Residuary Legatee or Remainderman.

Included in the inventory of assets of the Decedent, at date of death, was 100 shares of Coca-Cola International Corporation common stock, which stock was valued at $29,375.00 for Federal Estate tax purposes.

In August and September 1936, the "Trust Committee" of The Citizens and Southern National Bank, in accordance with the duties placed upon them by law, reviewed the assets of the Estate of Emanuel Ulman, and their findings resulted in a recommendation that all investments then held by the Estate be sold as early as possible.

The "Trust Committee" authorized and instructed the Trust Officer in Charge to sell all of the investments owned by the Estate of Emanuel Ulman.

The Trust Officer, acting under the instructions of the Trust Committee, delivered the 100 shares of Coca-Cola International Corporation common stock to Fenner & Beane, Stockbrokers, Macon, Georgia, with specific instructions that the stock was to be sold.

Fenner & Beane had full knowledge that the stock was placed with them to be sold on the New York Stock Exchange.

Fenner & Beane converted the 100 shares of Coca-Cola International Corporation common stock, into 800 shares of Coca-Cola Company common stock, *receiving eight certificates for* 100 *shares each, registered in the name of Fenner & Beane.*

The canceled Coca-Cola International Corporation common stock certificates bear the following rubber stamp notation "We hereby certify that we have no ownership, or interest, in shares of the stock above trans-

ferred. *The transfer by the owner to us being merely for the purpose of sale.* Fenner & Beane, 67 Broad St., N.Y.C."

Fenner & Beane did not deliver the converted stock (Coca-Cola Company) to the Trustee, but sold the 800 shares of Coca-Cola Company common stock, and remitted the proceeds to the Trustee.

Fenner & Beane made the conversion of 100 shares of Coca-Cola International common stock into 800 shares of Coca-Cola Company common stock with the consent of the Trust Officer of petitioner. There had been no sales of International on the New York Stock Exchange since November, 1934, whereas Coca-Cola Company common stock was being bought and sold almost daily. At that time there existed an inrevocable resolution of the Board of Directors of International, whereby the stockholders of International might at any time exchange their shares in International plus a small exchange fee, for eight times the number of shares of Coca-Cola.

Petitioner was advised by Fenner & Beane that it would facilitate matters if petitioner's 100 shares of International common was first exchanged with International for 800 shares of Coca-Cola common. Following this advice, petitioner's Trust Officer told Fenner & Beane to handle it in that manner.

The Board of Tax Appeals held that when Fenner & Beane exchanged with International for petitioner's account, the 100 shares of International Common, which were then retired, and received from International the 800 shares of Coca-Cola common, the receipt of such shares for petitioner's account represented "amounts distributed in partial liquidation" as that term is used in

Section 115(c) and defined in Section 115(i) of the Revenue Act of 1936, *supra*, and that despite the provisions of Section 117 (a), *supra*, of the same Revenue Act, 100 per centum of the gain so recognized should be taken into account in computing net income. The decision resulted in an additional tax of $10,850.80.

The Circuit Court of Appeals for the Fifth Circuit affirmed the decision of the Board of Tax Appeals, Circuit Judge Waller dissenting.

In the dissenting opinion, your petitioner's contentions are well summarized:

> "The exchange of stock was not made by the Trustee with any idea of aiding the Coca-Cola International Corporation to liquidate, but was done solely for the purpose of enabling the Trustee to comply with the requirements of the Georgia law. In substance, the Trustee, desiring to sell International stock, and finding that it could not, swapped it for something it could sell, and thereby disposed of a capital asset. The fact that Coca-Cola International was liquidating was purely incidental. *The transaction, in fact, purpose and substance, was a sale of a capital asset and not an exchange in aid of, or in contemplation of liquidation.* The entire purpose of the transaction was to permit the Trustee to dispose of a capital asset which it was illegal for it to hold under the Georgia law (*Clark v. Clark*, 167 *Ga.* 1; 144 *S.E.* 787; *Clark v. Citizens and Southern National Bank*, 172 *Ga.*, 625; 158 *S.E.* 297). I am unwilling to substitute form for substance when to do so penalizes one who is merely undertaking in good faith to comply with the State law. The Coca-Cola common stock was bought by the agent in the

name of the agent, and sold by the agent, all as a means of selling Coca-Cola International stock. It was illegal, under the Georgia law, for the Trustee to buy the Coca-Cola common stock to the same extent as it was illegal for it to hold the International stock. The purchase by the Trustee of the Coca-Cola stock appears to be void as against the public policy of the State of Georgia. Certainly the Trustee was not undertaking to buy Coca-Cola common stock. It was undertaking to sell Coca-Cola International stock. I consider the acquisition of the Coca-Cola common stock an incident only to the sale of the Coca-Cola International stock — the means to an end."

(Emphasis and citation ours).

We think that the Circuit Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this Court.

Certainly, if that statement is not correct, the Circuit Court of Appeals has decided an important question of Federal law which has not been but should be, settled by this Court. Further the Circuit Court of Appeals in this case has placed its decision on a principle which conflicts with decisions of the other Cricuit Courts of Appeals.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, directing that Court to certify and send to this Court, for its review and determination, on a day certain therein to be named, a full and complete transcript of the record and all proceedings in this case numbered and entitled on its

docket "No. 10616, The Citizens and Southern National Bank, Co-Trustee of the Estate of Emanuel Ullman, deceased, v. Commissioner of Internal Revenue", and that said judgment of the United States Circuit Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court, and that this petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.
July 19, 1943.

McKIBBEN LANE,

CHAS. J. BLOCH,

WILLIAM C. TURPIN, JR.,
Counsel for Petitioner.

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